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Public Prosecutor v Mohd Shaiful bin Mohd Jaafar

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–115–07 OF 2018
MOHD NAZLAN J
8 OCTOBER 2018

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Criminal Law — Sentence — Principles of sentencing — Offence under s 130Q of the Penal Code — Dealing with terrorist property — Whether public interest would prevail over interest of accused

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The accused was originally charged for an offence under s 130N(b) of the Penal Code ('the Code') which concerned providing property for terrorist act. When the case was subsequently called for mention, he chose to plead guilty to an alternative charge under s 130Q of the Code on dealing with terrorist property. Briefly, the accused was found by the police to have used his Maybank account to transfer a sum of RM890 as gift or donation described by him as money for 'jihad' to one Muhammad Hassan Syauqi bin Omar ('Hassan Omar') for the purpose of this money to be thereafter channelled to one Muhammad Fudhail bin Omar ('Fudhail Omar'), the brother of Hassan Omar. Fudhail Omar had been gazetted in the Government *Gazette* PU(A) 301 as terrorist belonging to the Islamic State terrorist group. Police investigation revealed that the accused had communicated with Fudhail Omar through the social media platform of 'Facebook Messenger' whereby the latter, believed to be in Syria, had instructed the former to transfer the sum of RM890 to the bank account of Hassan Omar, the brother of Fudhail Omar. This transfer was executed by the accused via Maybank2u based on a debit transfer entry recorded in the accused's statement of account in favour of Hassan Omar. In addition, the Maybank statement of account of Hassan Omar too stated the receipt of the sum of RM890 from the accused with the notation 'jihad'. The accused had thus committed an offence under s 130Q of the Penal Code for having transferred the RM890 directly to Hassan Omar, which sum of money was believed to be intended for use partly or fully by a terrorist or to commit a terrorist act. In mitigation, it was submitted that the accused's plea of guilty for an alternative charge under s 130Q had saved much judicial time as well as costs and resources of various parties. The accused, aged 32 was single and was the one supporting his mother. His father passed away and his siblings were still schooling. The accused was engaged in small time online business which generated income of between RM2,500 and RM3,000 per month. Since his detention for almost 14 months already, his mother had been unwell and the family's finances had continued to deplete given the absence of contribution from the accused, making it more challenging to the family to pay for his mother's medical

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expenses and his siblings' tuition fees. Specific to the offence, the accused claimed having no specific knowledge that Fudhail Omar was a terrorist. He had thought that the latter was merely an individual who was involved in a holy war or jihad against the Shiites for the atrocities and oppression claimed to have been committed on the Sunnis in Syria. The financial contribution to Fudhail Omar by the accused through Hassan Omar had therefore been made only with a view to assist the oppressed Sunnis in Syria. The accused had no record of previous conviction of any criminal offence. He was a first offender. The accused sought the forgiveness for the crime that he had committed and promised to be more careful in the future when released and not to be involved in any form of any criminal activity. He also expressed remorse. The prosecution urged the court to take into account the important issue of public interest before sentencing which should prevail over the interest of the accused.

Held, sentencing the accused to a term of imprisonment of two years and six months from the day of his arrest:

(1) There is no doubt that public interest demands that terrorism offences be dealt with severely by the justice system. Public interest naturally expects that society be protected from the scourge of terrorism. The sentencing principles of prevention and deterrence are especially pertinent (see para 21).

(2) When examining the length of custodial sentence, the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence as admitted by the accused, the mitigating factors, and sentences that had been imposed in the past for similar offences (see para 28).

(3) Section 130Q of the Code did not specify a minimum jail sentence. The accused in the present case contributed RM890 to a terrorist. In a sense, this was an indirect assistance to a cause abhorred the world over. The facts and the exhibits admitted did not reveal the accused himself being in any manner involved or associating himself with any terrorist group. The amount RM890, in comparison to the sums involved in the three cases referred to by the prosecution reflected much lesser on the gravity of the crime admitted by the accused. Further, the facts of this case did not indicate any plan on the part of the accused to actually take part in terrorist acts. As such, a long custodial sentence would not promote the objective of rehabilitation in sentencing. A lengthy incarceration in that sense would not be in the public interest (see paras 29–31, 34 & 38).

(4) It could not be truly disputed that the facts and particularly the conduct of the offender in *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 was more serious than the conduct of the accused in the present case who had merely effected transfer of RM890. The sentence meted

against the offender in that case was two years, after the court considered other antecedents and the background of the offender, in addition to the guilty plea. Similarly in the present case, the background of the accused ought to be taken into account. Although it could be said to be a natural consequence of those who were found guilty of transgressions of the law of the land, his incarceration had affected the livelihood of his ailing mother and family (see paras 41–42).

(5) In the final analysis a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval via a vis the offence in question. Public interest must indeed take precedence over other considerations and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective. Mitigating factors in favour of the accused, particularly the fact that he had pleaded guilty immediately upon the alternative charge being preferred and that he was a first-time offender with no previous criminal record and claimed to be remorseful were especially pertinent too, if not strong considerations (see para 43).

(6) Having evaluated those considerations, including having referred to the similar cases and in seeking to achieve a sentence that as closely possible reflect the key objectives of especially prevention and deterrence, but also retribution and reformation, the court held that the facts of the present case warranted a custodial sentence of two years and six months (see para 44).

[Bahasa Malaysia summary

Tertuduh pada mulanya disabitkan dengan kesalahan di bawah s 130N(b) Kanun Keseksaan ('Kanun Keseksaan') yang melibatkan perihal memberikan hartanah untuk tujuan aktiviti keganasan. Apabila kes dipanggil untuk sebutan, beliau memilih untuk mengaku salah kepada tuduhan alternatif di bawah s 130Q Kanun Keseksaan. Secara ringkasnya, tertuduh ditemui oleh pihak polis menggunakan akaun Maybank untuk memindahkan sejumlah RM890 sebagai hadiah atau derma yang dideskripsikan oleh beliau sebagai duit untuk jihad kepada seorang Muhammad Hassan Syauqi bin Omar ('Hassan Omar') untuk tujuan duit ini kemudiannya diberikan kepada seorang Muhammad Fudhail bin Omar ('Fudhail Omar'), abang kepada Hassan Omar. Fudhail Omar telah digazetkan di dalam *Warta* Kerajaan PU(A) 301 sebagai pengganas milik kumpulan pengganas Islamic State. Siasatan polis mendedahkan bahawa tertuduh telah berkomunikasi dengan Fudhail Omar melalui platform media sosial 'Facebook Messenger' yang mana Fudhail Omar, dipercayai berada di Syria, telah mengarahkan beliau untuk memindahkan sejumlah RM890 kepada akaun bank Hassan Omar, abang kepada Fudhail Omar. Pemindahan ini dilakukan oleh tertuduh melalui Maybank2u berdasarkan pemindahan debit yang direkodkan di dalam penyata akaun milik

tertuduh bagi Hassan Omar. Tambahan pula, penyata akaun Maybank milik Hassan Omar juga menunjukkan penerimaan RM890 daripada tertuduh dengan catatan 'jihad'. Tertuduh kini telah melakukan kesalahan di bawah s 130Q Kanun Keseksaan untuk pemindahan RM890 secara terus kepada Hassan Omar, yang mana jumlah duit dipercayai digunakan separuh atau penuh oleh pengganas atau untuk melalukan aktiviti keganasan. Dalam mitigasi, ia telah dihujahkan bahawa pengakuan salah tertuduh untuk tuduhan alternatif di bawah s 130Q telah menyingkatkan masa kehakiman juga kos dan sumber oleh semua pihak. Tertuduh, berumur 32 adalah bujang dan menanggung ibunya. Bapa beliau telah meninggal dunia dan adik-beradiknya masih bersekolah. Tertuduh menjalankan perniagaan dalam talian kecil-kecilan yang memberikan pendapatan di antara RM2,500 dan RM3,000 setiap bulan. Memandangkan beliau telah ditahan selama lebih kurang 14 bulan, ibu beliau telah tidak sihat dan kewangan keluarga terus berkurangan kerana kekurangan sumbangan daripada beliau, menjadikannya lebih susah kepada keluarga untuk membayar kos perubatan ibunya dan yuran tuisyen adik-beradik. Khusus kepada kesalahan, tertuduh mengatakan bahawa tiada pengetahuan khusus bahawa Fudhail Omar adalah pengganas. Beliau beranggapan bahawa Fudhail Omar hanyalah individu yang terlibat dalam perang suci atau jihad terhadap Syiah untuk kekejaman dan penindasan yang dikatakan telah dilakukan oleh pihak Sunnis di Syria. Sumbangan kewangan kepada Fudhail Omar oleh tertuduh melalui Hassan Omar dibuat dengan pandangan untuk menolong pihak Sunni yang tertindas di Syria. Tertuduh tiada rekod kesalahan terdahulu untuk apa-apa kesalahan jenayah. Beliau adalah pesalah pertama. Tertuduh meminta kemaafan terhadap jenayah yang telah dilakukan dan berjanji untuk menjadi lebih berhati-hati di masa hadapan apabila dilepaskan dan tidak akan terlibat dengan apa-apa aktiviti jenayah. Beliau juga menunjukkan penyesalan. Pendakwaan menggesa mahkamah untuk mengambil kira isu penting kepetingan awam sebelum menjatuhkan hukuman yang mana patut mengatasi kepentingan tertuduh.

Diputuskan, tertuduh dihukum untuk penjara selama dua tahun dan enam bulan daripada tarikh penangkapan:

(1) Tiada keraguan bahawa kepentingan awam meminta kesalahan keganasan untuk ditangani secara tegas oleh sistem keadilan. Keadilan awam secara semulajadinya menjangka bahawa masyarakat dilindungi daripada keganasan. Prinsip hukuman pencegahan dan deteren adalah penting (lihat perenggan 21).

(2) Dalam memeriksa kepanjangan tempoh hukuman tahanan, mahkamah patut mempertimbangkan keadaan menyeluruh dan mengambil kira lebih-lebih lagi tahap keseriusan jenis kesalahan yang dilakukan, fakta-fakta yang berkaitan dengan perbuatan kesalahan sepertimana yang diakui oleh tertuduh, faktor mitigasi dan hukuman-hukuman yang telah dijatuhkan untuk kesalahan yang sama terdahulu (lihat perenggan 28).

(3) Seksyen 130Q tidak mengkhususkan hukuman penjara minimum. Tertuduh di dalam kes ini mendermakan RM890 kepada pengganas. dalam satu segi, ini adalah bantuan secara tidak langsung untuk menyebabkan kekecohan dan/atau kecelakaan. Fakta-fakta dan ekshibit-ekshibit yang diguna pakai tidak mendedahkan tertuduh sendiri berkelakuan seperti terlibat atau mengaitkan dirinya dengan apa-apa kumpulan pengganas. Jumlah RM890, jika dibandingkan dengan jumlah yang terlibat di dalam ketiga-tiga kes yang dirujuk kepada pendakwaan menunjukkan tahap serius yang kurang terhadap jenayah yang dilakukan oleh tertuduh. Selanjutnya, fakta-fakta kes ini tidak menunjukkan terdapat apa-apa rancangan oleh tertuduh untuk mengambil bahagian terhadap aktiviti keganasan. Oleh itu, satu tempoh tahanan yang panjang tidak boleh menyokong objektif pemulihan dalam memberikan hukuman. Penjaraan yang panjang dari segi itu tidak menjadi kepentingan awam (lihat perenggan 29–31, 34 & 38).

(4) Tidak boleh disangkal bahawa fakta-fakta dan utamanya perbuatan pesalah itu di dalam *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 adalah lebih serius berbanding perbuatan tertuduh di dalam kes ini yang hanya memindahkan RM890. Hukuman yang diberikan terhadap pesalah di dalam kes ini adalah dua tahun, selepas mahkamah mempertimbangkan kes-kes sebelumnya dan latar belakang pesalah, tambahan kepada pengakuan bersalah. Sama dengan kes di sini, latar belakang tertuduh haruslah diambil kira. Walaupun ia boleh dikatakan sebagai akibat semulajadi untuk yang didapati bersalah dalam melanggar undang-undang negara, pemenjaraannya telah memberikan kesan kepada kehidupan ibunya yang sakit dan keluarganya (lihat perenggan 41–42).

(5) Dalam analisa terakhir mahkamah yang memberikan hukuman mempunyai tugasan untuk memastikan hukuman sesuai dengan tahap serius kesalahan yang dilakukan penjenayah dan memantulkan tahap ketidaksetujuan awam via a vis kesalahan yang menjadi persoalan. Kepentingan awam mestilah lebih penting daripada pertimbangan lain dan berhubung dengan itu, tahap serius kesalahan sepertimana yang ditunjukkan di dalam fakta-fakta kes mestilah diletakkan dalam konteks yang sewajarnya dan perspektif. Faktor-faktor mitigasi yang memihak kepada tertuduh, khususnya fakta bahawa dia telah mengakui salah sebaik sahaja tuduhan alternatif dibuat dan dia merupakan pesalah pertama tanpa apa-apa rekod jenayah sebelumnya dan mengatakan bahawa beliau menyesal adalah juga penting, jikalau tidak, adalah pertimbangan yang kuat (lihat perenggan 43).

(6) Selepas menilai pertimbangan tersebut, termasuk rujukan kepada kes-kes seumpamanya dan dalam mencapai hukuman yang paling dekat memantulkan kunci objektif penjagaan dan pencegahan, tetapi juga

A pemulihan dan penambahbaikan, mahkamah memutuskan bahawa fakta-fakta kes ini membenarkan hukuman tahanan selama dua tahun dan enam bulan (lihat perenggan 44).]

Notes

B For a case on principles of sentencing, see 4(3) *Mallal's Digest* (5th Ed, 2018 Reissue) para 4238.

Cases referred to

C *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, SC (refd)
Pendakwa Raya lwn Muamar Gadaffi bin Mohamad Shafawi [2017] MLJU 483, CA (refd)
Pendakwa Raya lwn Ummi Kalsom bt Bahak [2016] 6 MLJ 407, HC (refd)
Pendakwa Raya lwn Abdul Halim Ishak & Satu Lagi [2013] MLJU 821; [2013] 9 CLJ 559, CA (refd)
D *PP v Muhammad Kasyfullah bin Kassim* [2016] 6 MLJ 567; [2017] 1 CLJ 63 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Yazid bin Sufaat & Ors [2015] 1 MLJ 571; [2014] 2 CLJ 670, CA (refd)
E *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70, HC (refd)
R v Ipeelee [2012] SCC 13, SC (refd)

Legislation referred to

F Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 66B, 66D
Penal Code ss 130(1)(a), 130J, 130J(1)(a), 130N(b), 130F, 130Q, 511, Chapter VIA

G *Mohd Izhanudin bin Alias (Senior Federal Counsel, Attorney General's Chambers) for the prosecution.*
Nor Azri bin Mohd Arif (Mohd Zaini bin Marzuki with him) (Azri Harzani & Assoc) for the accused.

H **Mohd Nazlan J:**

INTRODUCTION

[1] This judgment concerns the sentence meted by this court on the I accused who pleaded guilty to a charge of the commission of an offence under s 130Q of the Penal Code.

KEY BACKGROUND FACTS

[2] The accused was originally charged for an offence under s 130N(b) of the Penal Code which concerned providing property for terrorist acts. When the case was subsequently called for mention, he chose to plead guilty to an alternative charge under s 130Q on dealing with terrorist property.

[3] The alternative charge reads as follows:

> Bahawa kamu pada 25 Mei 2017, jam lebih kurang 9.15 malam, di No 1605, Lorong Teja 34, Taman Keladi, Sg Petani, dalam daerah Kuala Muda, dalam negeri Kedah, dengan pengetahuan, telah mengendalikan secara tidak langsung harta pengganas yang bernama Muhammad Fudhail bin Omar (No Kad Pengenalan: xxxxxx-02-xxxx), dengan cara memberikan wang infak sebanyak RM890.00 melalui Muhammad Hassan Syauqi bin Omar (No Kad Pengenalan: xxxxxx-02-xxxx) dengan menggunakan akaun Maybank milik kamu bernombor 5520xxxxxxx), bagi manfaat pengganas tersebut yang merupakan satu kesalahan di bawah seksyen 130Q(1) Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.
>
> Hukuman: Jika disabitkan dengan kesalahan, hendaklah dihukum dengan penjara selama tempoh tidak melebihi dua puluh tahun atau dendan dan boleh dilucuthak mana-mana harta tersebut.

[4] Section 130Q states as follows:

> (1) Whoever knowingly deals, directly or indirectly, in any terrorist property shall be punished with imprisonment for a term which may extend to twenty years, or with fine and shall also be liable to forfeiture of any property so dealt with.
>
> (2) For the purposes of subsection (1), 'deals in' includes —
>
> (a) acquiring or possessing any terrorist property;
>
> (b) entering into or facilitating, directly or indirectly, any transaction in respect of terrorist property;
>
> (c) converting, concealing or disguising terrorist property; or
>
> (d) providing any financial or other services in respect of any terrorist property to or for the benefit of, or at the direction or order of, any terrorist, terrorist entity or terrorist group.

[5] The accused was then duly convicted for having committed the offence under s 130Q as charged, after this court was satisfied that the accused understood the nature and consequences of his plea and admitted to the charge without qualification, including to the facts of the case as presented and the exhibits tendered to the court.

A THE KEY FACTS OF THE CASE

[6] The facts of the case, as submitted by the prosecution, are not complex. The accused was found by the police to have used his Maybank account to transfer a sum of RM890 as gift or donation described by him as money for 'jihad' to one Muhammad Hassan Syauqi bin Omar ('Hassan Omar') for the purpose of this money to be thereafter channelled to one Muhammad Fudhail bin Omar ('Fudhail Omar'), the brother of Hassan Omar.

[7] Fudhail Omar has been *gazetted* in the Government *Gazette* PU (A) 301 as a terrorist belonging to the Islamic State terrorist group.

[8] Police investigation reveals that the accused had communicated with Fudhail Omar (with the latter using a telephone number confirmed by Celcom to be registered under his name, and which number is kept in the Ipad device of the accused) through the social media platform of 'Facebook Messenger' whereby the latter, believed to be in Syria, had instructed the former to transfer the sum of RM890 to the bank account of Hassan Omar, the brother of Fudhail Omar.

[9] This transfer was executed by the accused via Maybank2U based on a debit transfer entry recorded in the accused's statement of account in favour of Hassan Omar. In addition, the Maybank statement of account of Hassan Omar too stated the receipt of the sum of RM890 from the accused with the notation 'jihad'.

[10] The accused had thus committed an offence under s 130Q of the Penal Code for having transferred the RM890 directly to Hassan Omar, which sum of money was believed to be intended for use partly or fully by a terrorist or to commit a terrorist act.

MITIGATION BY THE ACCUSED

[11] In mitigation, it was submitted that the accused has chosen to plead guilty immediately upon being offered the alternative charge under s 130Q, and this has saved much judicial time, as well as costs and resources of various parties.

[12] The accused, aged 32 is single and is the one supporting his mother. His father has passed away and his siblings are still schooling. The accused was engaged in small time online business which generated income of between RM2,500 and RM3,000 per month. Since his detention for almost 14 months already, his mother has been unwell and the family's finances had continued to

deplete given the absence of contribution from the accused, making it more challenging to the family to pay for his mother's medical expenses and his siblings' tuition fees.

[13] Specific to the offence, the accused claimed having no specific knowledge that Fudhail Omar is a terrorist. He had thought that the latter was merely an individual who was involved in a holy war or *jihad* against the Shiites for the atrocities and oppression claimed to have been committed on the Sunnis in Syria. The financial contribution to Fudhail Omar by the accused through Hassan Omar had therefore been made only with a view to assisting the oppressed Sunnis in Syria.

[14] The accused has no record of previous conviction of any criminal offence. He is a first offender. The accused sought the forgiveness for the crime that he had committed and promised to be more careful in the future when released, and not to be involved in any form of any criminal activity. He expressed remorse.

[15] The counsel for the accused also highlighted in particular two main cases relied on by the accused. The first is *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 on the reduction or discount normally granted to the jail sentence in situation where the accused pleads guilty, where it was held by the Supreme Court as follows:

> In this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. *It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.*In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment. (Emphasis added.)

[16] The other case is *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407 where the High Court sentenced the accused who pleaded guilty to an offence under s 130(1)(a) read together with s 511 of the Penal Code to two years imprisonment despite s 130J providing for a maximum jail sentence of 30 years. This is contrasted with the maximum jail term of 20 years prescribed under s 130Q under which the accused herein had pleaded guilty.

A SUBMISSION ON AGGRAVATING FACTORS BY THE PROSECUTION

[17] The prosecution urged this court to take into account the important issue of public interest before sentencing, which should prevail over the interest of the accused, and referred to the decision of Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 who held the following:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[18] The prosecution also referred to the same case cited by the counsel for the accused, that is *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 where the Supreme Court held thus:

> In assessing the length of custodial sentence the court must look at the overall picture in perspective by considering firstly the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

F EVALUATION AND DECISION OF THIS COURT

[19] Nothing can detract from the fact that the offence for which the accused had pleaded guilty is one related to terrorism. The Government *Gazette* PUA (301) declared the group known as Islamic State to be a terrorist group under ss 66B and 66D of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[20] In this context, a leading pronouncement on the seriousness of the threat of terrorist activities was made by the Court of Appeal in *Public Prosecutor v Yazid bin Sufaat & Ors* [2015] 1 MLJ 571; [2014] 2 CLJ 670 in the following terms:

> [23] An act of terrorism is a transnational phenomenon. It has no territorial limits. It transcends national borders. For instance, an act of terrorism may be planned or hatched within Malaysia with an intention to execute it outside Malaysia. The intention of SOSMA is, among others, to prevent Malaysia from being used as a terrorist haven. S Rajendra Babu and GP Marthur JJ in *People's Union for Civil Liberties & Anor v Union of India AIR* [2004] SC 456 aptly describe acts of terrorism as follows:

> The terrorist threat that we are facing is now on an unprecedented global scale. Terrorism has become a global threat with global effects. It has become a challenge to the whole community of civilized nations. Terrorist activities in one country take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a government across another, and procuring arms from multiple sources. Terrorism in a single country can readily become a threat to regional peace and security owing to its spill over effects. It is therefore difficult in the present context to draw a sharp distinction between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity.

[21] There is no doubt that public interest demands that terrorism offences be dealt with severely by the justice system. Public interest naturally expects that society be protected from the scourge of terrorism. The sentencing principles of prevention and deterrence are especially pertinent.

[22] Terrorist related offences are enacted under Chapter VIA of the Penal Code. They are all provisions dealing with the abhorrent and serious crimes of terrorism. But the provisions seek to address a range of different types of terrorist related activities. The instant case concerns s 130Q where the maximum imprisonment is 20 years.

[23] In the case of *Pendakwa Raya lwn Ummi Kalsom bt Bahak* for example, the applicable s 130J provides for life imprisonment or a maximum jail sentence of 30 years, but the accused was sentenced to two years. In *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] 6 MLJ 567; [2017] 1 CLJ 63 the Court of Appeal also increased the sentence of the accused who pleaded guilty to an offence also under s 130J(1)(a) of the Penal Code — on providing support to the commission of a terrorist act involving the use of firearm — from five to 12 years.

[24] In *Pendakwa Raya lwn Muamar Gadaffi bin Mohamad Shafawi* [2017] MLJU 483 even though the accused pleaded guilty to an offence under s 130F of the Penal Code (which provides for a maximum jail terms of 30 years), the Court of Appeal enhanced the jail term to 15 years. In that case, the accused opened two Facebook accounts to propagate militant Islamic State ideology to friends on the social media, and provided military type training to them.

[25] And then there is the decision in *Pendakwa Raya lwn Abdul Halim Ishak & Satu Lagi* [2013] MLJU 821; [2013] 9 CLJ 559 where the court observed thus:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not

to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part, its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

[26] The differences in the maximum punishment enacted in the different statutory provisions reflect the dissimilarity in the degree of severity and seriousness of the various crimes. That much is clear.

[27] But it is also the case that in respect of a specific section, say s 130Q herein, the maximum of 20 years jail also reflects the range of possible length of incarceration which is dependent on the exercise of a judicial discretion on the appropriate sentence. This is where the observation made by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor*, a case referred to earlier, becomes especially pertinent.

[28] Thus, when examining the length of custodial sentence, the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence as admitted by the accused, any mitigating factors, and sentences that have been imposed in the past for similar offences.

[29] Firstly, this s 130Q does not specify a minimum jail sentence, unlike say, s 130N(b) for which the accused was originally charged with, which states a minimum jail term of seven years whilst enacting a maximum of life imprisonment or for a term of 30 years.

[30] Secondly, the facts of the commission of the crime in this case show that the true substantive crime was the act of the accused performing an online transfer of RM890 to the account of the brother of a terrorist for the purpose of jihad. The accused in other words contributed RM890 to a terrorist. In a sense this is an indirect assistance to a cause abhorred the world over.

[31] The accused even claimed not to have any knowledge that Fudhail Omar was a terrorist, believing then that the latter was involved in helping the Sunnis who are said to be oppressed by the Shiite regime in Syria. In fact the facts and the exhibits admitted do not reveal the accused himself being in any manner involved or associating himself with any terrorist group. His crime therefore was in the language of s 130Q for dealing with terrorist property which term 'dealing' in this case could only mean providing financing to a terrorist under s 130Q.

[32] The learned DPP, for the prosecution referred to three court decisions on s 130Q of the Penal Code which according to the prosecution involved

similar facts in relation to the making of contributions of money to a terrorist. But it was indicated that these were unreported. Even the case numbers were not furnished. Neither were newspaper reports provided. These were as follows:

(a) *Public Prosecutor v Mohamed Danny Mohamed Jedi*, where the Federal Court affirmed the Court of Appeal's increase of the jail sentence to eight years from the original sentence of four years from the date of arrest imposed by the High Court;

(b) *Public Prosecutor v Mohd Haniffa Syedul Akbar*, where the jail sentence was ten years from arrest date; and

(c) *Public Prosecutor v Mohamad Jazrin Mohamad Azaha*, where the term of imprisonment was for six years.

[33] The counsel for the accused highlighted that he was unable to comment on these cases without any further information on the same. However upon further query from this court on the sums of money involved in these three case, the learned DPP informed the court that in *Public Prosecutor v Mohamed Danny Mohamed Jedi* the amount was RM12,000, in *Public Prosecutor v Mohd Haniffa Syedul Akbar* it was RM14,000, and in *Public Prosecutor v Mohamad Jazrin Mohamad Azaha* the sum involved was RM2,000. And that in all three cases, the transfers were made to a known Malaysian terrorist operating in Syria.

[34] The fact that in the instant case, the amount involved is RM890 which is considerably less than the sums in the other three cases is in my mind a significant factor in the evaluation of the gravity of the commission of the crime by the accused. It is not the most important to the extent of relegating others like public interest to take a backseat. Not at all. But RM890, in comparison to the sums involved in the three cases referred to by the prosecution reflects much lesser on the gravity of the crime admitted by the accused.

[35] It is true that the relatively small sum does not derogate from the fact that contribution had been made by the accused to a terrorist. But it cannot be denied either that the sentence to be meted must be proportionate to both the gravity of the offence and the degree of responsibility of the accused. In the often quoted decision of the Canadian Supreme Court in *R v Ipeelee* [2012] SCC 13 it was held by Le Bel J instructively as follows:

> Proportionality is the *sine quo non* of a just sentence. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and

ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[36] When the aspect of the moral turpitude or blameworthiness of the accused in this case is examined, it could be fairly stated that the crime of dealing with the property of a terrorist group is more indirect as the act in question is the online transfer of a sum of money which comparatively is small when other cases are taken into account to discern the sentencing trend on terrorist related offences, s 130Q in particular.

[37] It bears repetition that the evidence in this case shows just this one transaction. It was merely a one-off. There was no systematic arrangement where monies are solicited from others, or that transfers were done in favour of various individuals. Neither is there evidence of the accused propagating any militant causes of any terrorist organisations like in *Muamar Gadaffi bin Mohamad Shafawi*. And the dealing in terrorist property is just that — the transfer of the RM890 — nothing more and nothing less. This is also quite unlike the facts in *Public Prosecutor v Muhammad Kasyfullah bin Kassim* where the offender pleaded guilty to providing support to the commission of a terrorist act involving the use of firearm.

[38] Further, the facts in this case do not indicate any plan on the part of the accused to actually take part in terrorist acts. It was not even suggested that the accused has been involved in committing any violent acts. As such, a long custodial sentence would not in this case promote the objective of rehabilitation in sentencing. A lengthy incarceration in that sense would not be in the public interest.

[39] I accept that in the case of *Pendakwa Raya lwn Ummi Kalsom bt Bahak* where the accused was sentenced to two years in jail despite the applicable s 130J providing for a maximum jail sentence of 30 years or life imprisonment, the alternative charge was read together with s 511 which concerns offences in the nature of attempts to commit crimes. This meant that the maximum jail sentences is halved by statute, and the maximum became 15 years.

[40] In other words the offence in that case was incomplete, or inchoate. Yet when one examines the objectionable conduct in that case, it cannot be said that what she attempted to do was not grave. The offender in that case had planned to go to Syria to get married to a Malaysian terrorist and generally to provide support and assistance to the Islamic State group. She was caught at KLIA2 before she could board a flight to Brunei from where she would have continued her journey to Istanbul before reaching Syria. In other words, but for the arrest that foiled everything for her, the offender in that case had every

intention and had taken positive steps to travel and pretty much to be part of the IS group at the heart of the civil conflict and the associated violence and atrocities in war-torn Syria.

[41] I do not think it can be truly disputed that the facts and particularly the conduct of the offender in *Pendakwa Raya lwn Ummi Kalsom bt Bahak* is more serious than in the case of the accused before this court who had merely effected a transfer of RM890. The sentence meted against the offender in that case was two years, after the court considered other antecedents and the background of the offender, in addition to the guilty plea.

[42] Similarly in this case, the background of the accused cannot not be taken into account. Although it can be said to be a natural consequence of those who are found guilty of transgressions of the law of the land, his incarceration has affected the livelihood of his ailing mother and family. Thus in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, Abdul Rahman Sebli J (as he then was) said:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. *But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.* (Emphasis added.)

[43] In the final analysis a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval vis a vis the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective. Mitigating factors in favour of the accused, particularly the fact that he had pleaded guilty immediately upon the alternative charge being preferred, and that he is a first time offender with no previous criminal record and claimed to be remorseful are especially pertinent too, if not strong considerations.

[44] Having evaluated those considerations, including having referred to the aforesaid similar cases and in seeking to achieve a sentence that as closely as possible reflect the key objectives of especially prevention and deterrence, but also retribution and reformation (see *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186), in my judgment, the facts of this case warrant a custodial sentence of two years and six months.

A CONCLUSION

[45] In view of the foregoing, in particular having regard to the facts of the case, the mitigating and aggravating factors and the principles of sentencing, I sentenced the accused who is convicted upon his guilty plea to a charge for an offence under s 130Q of the Penal Code, to a term of imprisonment of two years and six months from the day of his arrest.

Accused sentenced to a term of imprisonment of two years and six months from day of his arrest.

Reported by Addibah Adnan